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No. 87-1898

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LARRY W. BRYANT,

Petitioner

v.

FRANK C. CARLUCCI, SECRETARY OF DEFENSE, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY BRIEF

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Because his views displeased them, petitioner's federal superiors used their supervisory powers to punish him on the job for his speech off the job on a matter of public interest unrelated to his work. The Government characterizes his complaint as "minor" because the punishment did not involve his demotion or removal from his civil service job (Opp. Mem. 6-7). However, that description ignores the point that petitioner's writings which offended his superiors were "pure speech," which the Court has "repeatedly held is entitled to comprehensive protection under the First Amendment." *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 505-506 (1969).

After he had vainly sought protection from this invasion of his liberties through the non-adjudicative administrative procedures that were available to him under the Civil Service Reform Act of 1978 (CSRA), petitioner turned to the federal courts for equitable relief. The Government now urges the Court not to review the denial of that relief by the courts below.

The Government does not claim that the issue presented is unimportant. Its principal suggestion is that the Court should deny review in this case because it should "take a break" from deciding federal employment cases until it sees how the lower federal courts react to its decisions last term in *United States* v. *Fausto*, —— U.S. ——, 108 S.Ct. 668 (1988), *Webster* v. *Doe*, —— U.S. ——, 108 S.Ct. 2047 (1988), and *Schweiker* v. *Chilicky*, —— U.S. ——, 108 S.Ct. 2460 (1988) (see Opp. Mem. 4). However, none of those decisions addresses the issue presented here, *i.e.*, access to the federal courts to seek equitable protection for a federal employee's exercise of First Amendment rights where Congress has enacted no such protection.

Of those three 1987 term cases, *Webster* v. *Doe* seems to bear most closely on the issue here; yet it certainly looks in the opposite direction from the decision of the court below. There, in a case arising outside of the CSRA, the Court reaffirmed the requirement that the Congressional intent to deny judicial review must be clear. "We require this heightened showing in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Id.*, 108 S.Ct. at 2053. However, that is exactly the construction which the Fourth Circuit gave to the CSRA in this case and in *Pinar* v. *Dole*, 747 F.2d 899 (4th Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985).

As the government recognizes (Opp. Mem. 4-5) and as Justice Blackmun noted in his concurrence in *Fausto*,

108 S.Ct. at 677, that case did not involve this "serious constitutional question." Therefore, it will provide no new guidance on the question for the lower courts. *Fausto* decided only that, in enacting the CSRA, Congress intended to supersede another older statutory remedy which had previously been available to a federal employee who lost pay because of an adverse personnel action.

In *Schweiker* v. *Chilicky* the Court refused to allow a *Bivens*[1] claim for consequential damages suffered by persons who had been wrongly deprived of Social Security Act disability benefits and had succeeded in getting those benefits restored only after lengthy and costly litigation within the administrative remedy scheme established by Congress. The Court also vacated and remanded for reconsideration in light of that decision two other pending cases in which courts of appeals had upheld *Bivens*-type damage claims asserted by federal employees: *McIntosh* v. *Weinberger*, 810 F.2d 1411 (8th Cir. 1987), *vacated*, —— U.S. ——, 108 S.Ct. 2861 (1988); *Kotarski* v. *Cooper*, 799 F.2d 1342 (9th Cir. 1986), *vacated*, —— U.S. ——, 108 S.Ct. 2861 (1988). However, the remands will not disturb the lower court decisions in those cases insofar as they also approved equitable protection for federal employees against violations of their constitutional liberties.

To the extent that it bears on that issue—the one also presented here—*Schweiker* v. *Chilicky* casts added doubt on the reasoning of the court below, which relied heavily on *Bush* v. *Lucas*, 462 U.S. 367 (1983). *Schweiker* v. *Chilicky* makes it clear that *Bush* v. *Lucas* dealt only with the narrow question of an attempt to supplement the CSRA's statutory remedies with a *Bivens* damage remedy. In both cases the claimants sought damages even though the statutory schemes had provided them basic

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[1] See *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

equitable relief through quasi-adjudicative administrative procedures that were available as a matter of right and were subject to judicial review. The employee in *Bush* v. *Lucas* had already been restored to his old position with back pay. The claimants in *Schweiker* v. *Chilicky* had won restoration and payment of all their disability benefits. Thus, neither case presented the "serious constitutional question" of a statute which fails to provide *any* judicial or quasi-judicial forum for equitable relief from violations of constitutional liberties. This case does.

In deciding that question, the court below reached a conclusion that is now in conflict with the positions of at least five other circuits. The *per curiam* decision of the Eleventh Circuit in *Perry* v. *Thomas*, 849 F.2d 484 (11th Cir. 1988), indicates that it has now joined the Seventh, Eighth, Ninth and D.C. Circuits in upholding the type of constitutional claim petitioner asserts.[2] It was pointed out above that the remands of *McIntosh* and *Kotarski* will not narrow this conflict, as the Government suggests (Opp. Mem. 8); for the remands concern only the *Bivens* claims in those cases.

The Government's suggestion that the Court should simply let this unresolved constitutional issue fester for an undefined period of time is difficult to understand. Indeed, it does not seem to be advanced with much conviction. There is nothing in the decisions issued last term that will settle the issue or even persuade the Fourth Circuit to reexamine it. The outcome in future cases would continue to be an accident of geography.

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[2] *Perry* v. *Thomas* also shows that not all federal agencies agree with the Solicitor General that the federal courts are not open to grant federal employees injunctive relief against invasion of their First Amendment rights. In *Perry* the Equal Employment Opportunity Commission conceded that such relief is available in appropriate cases.

Petitioner would remain at risk of further violations of his First Amendment rights by his superiors.

Yet his case presents the strongest possible constitutional claim for relief. There is no contention by respondents that Mr. Bryant's speech was in conflict with his employment. To the contrary, it was the adventitious fact of his federal employment that gave his superiors a leverage they would not otherwise have had to punish and inhibit his speech because it offended their own views. No other case has so clearly presented the question whether the CSRA can constitutionally be construed in such a manner that it *penalizes* the liberties of citizens who happen to work for the United States by denying them relief which the federal courts would otherwise surely afford.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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